Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

A-1 AMBULANCE SERVICE, INC.,

Petitioner,

v.

ROBERT J. MELTON, M.D., M.P.H.,
THE COUNTY OF MONTEREY, CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Petitioner's Private Emergency Ambulance Property Dedicated to Serve the Public Protected by the Fourteenth and Fifth Amendments?

2. Has Petitioner Stated A Cause of Action Under the Due Process and Public Use Clauses of the Fourteenth and Fifth Amendments to the United States Constitution Where Respondent County Requires Petitioner to Carry Indigent Patients Transported Free or below Reasonable Costs as a Condition of Doing Business in Monterey County?

3. Has Petitioner Stated a Cause of Action Under the Due Process and Public Use Clauses of the Fourteenth and Fifth Amendments to the United States Constitution Where Petitioner's Emergency Ambulance Property is Regulated by Respondents' Ordinance Which Conflicts With State Law Regarding Jurisdiction, Municipal Powers and Police Powers?

4. Has Petitioner Stated A Cause of Action Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution Where Respondent County Regulates Emergency Ambulance Services While Having a Legal Duty to Pay for Services to Indigents?

5. Assuming *arguendo*, remand, do the Respondents Enjoy Absolute or Qualified Immunity if their Acts are *ultra vires*?

PARTIES TO THE PROCEEDINGS

Petitioner and the plaintiff below is A-1 Ambulance Service.

The respondents are Robert J. Melton, M.D., M.P.H., Chris Le Venton, the Monterey County Emergency Medical Services Agency, the County of Monterey, California, the Monterey County Board of Supervisors, Sam Karas, Tom Perkins, Judy Pennycook, Simon Salinas, Edith Johnsen, Michael Williams, the Abaris Group, Kent Coxon, Todd Valeri and Daniel Smiley.

STATEMENT PURSUANT TO RULE 29.6

Petitioner A-1 Ambulance Service, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

This petition presents a Judgment of the Ninth Circuit. The Judgment of the District Court was entered on September 29, 1998 and is included at App. p. 19a. The unpublished Order Granting Defendants' Motions to Dismiss had been filed May 22, 1996 and is included at App. p. 3a. The unpublished Memorandum Opinion of the Ninth Circuit Court of Appeals affirming the District Court's Judgment was filed October 21, 1999 and is included at App. p. 1a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction by virtue of 28 U.S.C. §§ 1342(3) and 1343(4) authorizing jurisdiction of claims brought under 42 U.S.C. § 1983 to enforce rights guaranteed by the United States Constitution. The Court of Appeals entered its judgment on October 21, 1999. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, which provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

> any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Calif. Const. Art. XI § 1(b) which provides in relevant part: "The Legislature shall provide for county powers."

Calif. Const. Art. XI § 7, which provides: "a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

Calif. Const. Art. XI § 8, which provides in relevant part: "(a) The Legislature may provide that counties perform municipal functions at the request of cities within them."

Calif. Const. Art. XII § 3 which provides in relevant part: "Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people * * * directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. * * *"

Calif. Gov. Code § 38794: "The legislative body of a city may contract for ambulance service to serve the residents of the city as convenience requires."

STATEMENT OF THE CASE

This is a civil rights case concerning the alleged unconstitutional regulation through a county ordinance of the emergency ambulance property of petitioner A-1 Ambulance Service, Inc. ("A-1 Ambulance"). Underlying the acts alleged taken against petitioner is a procurement system approved by a state agency administrator which permits respondent Monterey County, *inter alia*, to select emergency ambulance providers who agree to relieve the state and the counties of their costs for emergency ambulance services to indigent patients by shifting them to non-indigent patients and their insurers.

Petitioner A-1 Ambulance provided emergency and non-emergency medical transportation services to the public in Monterey County, California since 1955.

During this period of time, in 1980, the State of California established the Emergency Medical Services Authority pursuant to the Emergency Medical Services System and Prehospital Emergency Care Act in order to create a state-wide system for emergency medical services, and to promote the development, accessibility, and provision of emergency medical services to the people of the state. Calif. Health & Safety Code § 1797.1[1].

Counties in California implementing a program under the EMS Act must designate a local EMS agency that will be responsible for the administration of the program, including emergency ambulance and paramedic services. Calif. Health & Safety Code § 1797.200. The local EMS Agency was delegated a narrow scope of power under the EMS Act. Calif. Health & Safety Code § 1797.204, Calif. Health & Safety Code § 1797.220, and Calif. Health & Safety Code § 1797.208.

The state EMS Authority reviews local EMS plans and determines whether they are consistent with the EMS Act and any regulations and/or guidelines promulgated by the state EMS Authority. Calif. Health & Safety Code § 1797.105. Only the EMS Authority has the power to adopt such rules and regulations as may be reasonable and proper to carry out the purposes and intent of the Act. Calif. Health & Safety Code § 1797.107.

In 1984, the state legislature enacted amendments to the EMS Act going to the grant of state action antitrust immunity. The California statutory scheme confers discretionary power

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1. The texts of the cited California State Emergency Medical Services statutes are set forth in Appendix E.

on an EMS agency to create exclusive operating areas for emergency ambulance providers and advanced life support providers within the "EMS area" of the local EMS Agency. Calif. Health & Safety Code § 1797.224. The "EMS area" itself is limited by statute to the geographic areas of the county and those cities which expressly agree, through joint powers EMS agencies, to participate. Calif. Health & Safety Code § 1797.74; Calif. Health & Safety Code § 1797.200.

Respondent County of Monterey ("County") designated its Health Department as the Monterey County EMS Agency ("EMS Agency") and appointed respondent Dr. Robert J. Melton ("Dr. Melton"), County's Health Officer, as the Medical Director of the agency. After respondent EMS Agency initiated the paramedic program in Monterey County, petitioner A-1 Ambulance began paramedic ambulance service in 1986.

In 1988 respondent County enacted an ordinance which froze ambulance rates at the 1986 levels and enjoined petitioner's prices back to the 1986 levels. *People v. A-1 Ambulance Service Inc.*, County of Monterey, California Superior Court No. M 19916. The suit was dismissed in September 1993 on motion of petitioner for failure to prosecute within five years.

In 1989, respondents County and EMS Agency conducted a "competitive process" for emergency and non-emergency ambulance service solely within petitioner's zone of operations. Petitioner preliminarily enjoined the bid process on antitrust grounds in Federal Court. DCNC No. C-89-20157. In October 1995, the District Court rendered its decision against County on a unconstitutional rate regulation claim and an antitrust claim that state action

immunity does not apply to regulation of non-emergency ambulance services.

County appealed to the Ninth Circuit Court of Appeals which affirmed the section 1983 rate claim, but reversed the permanent injunction, holding that certain non-emergency ambulance services were within the scope of state action immunity. The Court remanded for a recalculation of the damages period. *A-1 Ambulance Service, Inc. v. County of Monterey et al.*, 90 F.3d 333 (9th Cir. 1996). Respondent County settled with petitioner in February 1997.

However, while petitioner had not yet been made economically whole, respondents County and EMS Agency initiated another ambulance procurement covering all of Monterey County. Beginning September 1994, respondent County by its respondent Board of Supervisors, Sam Karas ("Karas"), Tom Perkins ("Perkins"), Judy Pennycook, ("Pennycook"), Simon Salinas ("Salinas"), and Edith Johnsen ("Johnsen") ("Board" collectively and individually) contracted with respondents Michael Williams ("Williams") and Williams' consultation organization, The Abaris Group ("Abaris") to develop an EMS plan and execute the procurement. By March 17, 1995, respondent Daniel Smiley ("Smiley"), deputy director State EMS Authority, had reviewed and approved the EMS plan and competitive process which in relevant part provided that all of Monterey County was under the jurisdiction of a Health Department EMS Agency.

On March 28, 1995, respondent Board (collectively and individually) enacted Ordinance No. 3815 regarding the Emergency Medical Services System in Monterey County. One part at issue herein is the definition of EMS area which

included the cities. Monterey County Ord. No. 3815 Definitions, EMS Area. The ordinance also placed the County Board of Supervisors as one of the entities which may exercise EMS Agency power Monterey County Ord. No. 3815, Definitions, "EMS Agency"[2]. Respondents required that an ambulance provider have a "license" or "contract" with respondent County to do business in Monterey County. Monterey County Ord. No. 3815, § 15.40.040. Respondent County also asserted authority to assign to respondent EMS Agency the power to set ambulance rates throughout Monterey County. Monterey County Ord. No. 3815, § 15.40.046.

Respondent County issued its Request for Proposal on April 7, 1995.

Petitioner filed a responsive bid on July 10, 1995. Two other organizations filed responses, Peninsula Paramedics, Inc. ("Pen Med"), a private corporation and Carmel Regional Fire Authority ("CRFA"), a public entity formed to provide ambulance services. Respondent Chris Le Venton, ("Le Venton") the Monterey County Local EMS Agency administrator, advised petitioner A-1 Ambulance that a proposal review committee elected to have the bidders give a presentation on August 9, 1995.

At the presentation, Respondent Williams denied petitioner's attempt to determine if the panel members had economic interests in providing emergency medical services. Respondent Le Venton disclosed later that at least, respondents Todd Valeri ("Valeri"), a private ambulance

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2. The texts of the selected Monterey County Ord. sections are set forth in Appendix E.

service manager and Kent Coxon, an EMS Administrator for Sonoma County had arguable conflicts of interests.

In September 1995, respondents Board and EMS Agency awarded the exclusive contract to Pen Med to begin January 1, 1996. The ambulance rates were set by respondents EMS Agency, Board and County by agreement with Pen Med as provided for in respondent County's ordinance.

In the course of participating in the procurement and ambulance services litigation, petitioner A-1 Ambulance determined that the state EMS Authority under the direction of respondent Smiley had approved numerous exclusive ambulance contracts between private ambulance operators and counties which provided that the EMS area included, *inter alia*, incorporated cities although the EMS agencies uniformly were County Health departments or Joint Power EMS Agencies between county health departments. Moreover, the county contracts provided that the general public paid more than the state or county for the same level of ambulance service. Petitioner alleged these facts in its complaint as examples: The approved County of San Mateo, California base rate in 1991 for paramedic ambulance service to the public was $525, but the State and county received the same service for its patients paying but $71, if not free, for the base rate. The approved County of Sonoma, California base rate for the public was $420 while the state and county would pay only $61.71 for the same service.

PROCEEDINGS BELOW

The complaint was filed August 31, 1995. The amended complaint was filed on September 19, 1995.

Respondents Melton, Le Venton, Karas, Perkins, Pennycook, Salinas, Johnsen, Abaris, Williams, Coxon, and Valeri (the individual respondents) moved for dismissal on September 21, 1995 pursuant to Fed. R. Civ. P. 12(b)(6). The grounds were absolute and qualified immunities and failure to state a claim in that no protected property right was violated.

Respondents, the EMS Agency, County and Board (collectively) represented by County Counsel also moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The grounds were failure to state a claim in that petitioner had alleged no protected property right.

Respondent Smiley moved for dismissal on Eleventh Amendment grounds.

Following County Counsel's appearance, petitioner A-1 Ambulance moved for default judgment against respondent County on grounds that County Counsel was simultaneously representing conflicting legal entities by representing the local EMS Agency, on the one hand, and Monterey County and its Board of Supervisors on the other.

After a hearing the District Court entered an order on May 22, 1996 granting the County defendants' motions to dismiss basing its decision in great measure on its construction of the state EMS Act. App. B, p. 3a.

The district court reasoned that the taking resulting from deprivation of the use of its state license and the competitive process itself were not unlawful, because the Court "sees nothing in the EMS Act which prohibits the involvement of Monterey County and its Supervisors". App. B, p. 10a.

Apparently in reference to the allegation that respondent County's ordinance is unlawful, the district court reasoned that "the EMS Act anticipates that local EMS agencies may adopt regulations, standards, and guidelines pursuant to the EMS Act", equating respondent County's ordinance to agency legislation. App. B, p. 11a.

The district court reasoned that no constitutional violation arose from the creation of an exclusive operating area by respondent county because "there is nothing in the EMS Act which requires the local Agency to be an entity separate from the County." App. B, p. 12a.

The district court reasoned that no constitutional taking had occurred by respondent County's creation of exclusive zones by its ordinance because the creation of exclusive zones was authorized by the EMS Act and substantially advances the legitimate state interest in the provision of emergency medical services, citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

Alternatively, the district court reasoned that since petitioner may still conduct non-emergency business with its license, it had economically viable use remaining, citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). App. B, p. 13a.

Building on that holding, the district court reasoned petitioner's biased decision-maker's due process claim failed because petitioner failed to show a protected property interest. App. B. p. 14a.

The district court also held that respondent Board had absolute legislative immunity on enactment of the challenged

ordinance since it constituted a legislative act. In addition, the court held that respondents Dr. Melton and Le Venton, the two administrators together with respondents Abaris, the private consulting corporation, and its president respondent Williams all had absolute legislative immunity. App. B, p. 15a.

In addition, the district court held that respondents Board and Individual Defendants, including all the private defendants, had qualified immunity for their executive acts, since the unlawfulness in participating in the bid process pursuant to the challenged ordinance, if any, was not apparent. App. B, p. 16a.

Lastly, the district court held that respondent Smiley had qualified immunity because he could not have known that respondent County's ordinance violated any of petitioner's constitutional rights, although his defense had been Eleventh Amendment immunity. App. B, p. 17a.

The district court denied petitioner's motion for default judgment reasoning that the EMS Agency is not separate from the County and the interests of the County and the EMS Agency are not adverse in this matter. App. D, p. 22a.

The Judgment of Dismissal was entered on September 29, 1998. App. C., p. 19a.

The Ninth Circuit Court of Appeals affirmed the District Court judgment on October 21, 1999, summarily holding that "the district court correctly determined that plaintiff was not deprived of a right, privilege or immunity secured by the United States Constitution or the laws of the United States". App. A., p. 2a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Decision Conflicts Directly With Long Established Decisions of This Court Concerning the Property of Private Entities Which Serve the Public.

I.

PETITIONER'S STATE AMBULANCE LICENSE IS CONSTITUTIONALLY PROTECTED DUE TO ITS DEDICATION OF PRIVATE PROPERTY FOR PUBLIC USE.

The operation of public utilities and common carriers has long been held to be protected by the Fourteenth Amendment Due Process and Fifth Amendment takings clauses of the United States Constitution as a *quid pro quo* for dedicating private property for governmental functions. "This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

Under California law, private transportation systems and common carriers are public utilities subject to regulation by the state legislature. Calif. Const. Art. XII § 3. Public utilities are required to furnish and maintain such adequate, efficient service as are necessary to promote the safety health, comfort and convenience of its patrons, employees and the public. All charges by any public utility shall be just and reasonable. Calif. Public Utilities Code § 451. "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, *supra*, at 308.

II.

RESPONDENTS ARBITRARILY AND UNCONSTITUTIONALLY TAKE PETITIONER'S PROPERTY BY REQUIRING PETITIONER TO CHARGE UNJUST AND UNREASONABLE FEES AS A CONDITION FOR A CONTRACT.

Petitioner argues that its property is taken in the constitutional sense and its due process rights are deprived when a local government mandates that in order to get a contract to provide the public with medical transportation, petitioner is required to charge the public unjust and unreasonable prices so as to fund the state and county's duty to pay for its emergency patients. Since emergency ambulance providers must carry all patients when medically required regardless of the economic status of the patient, emergency ambulance services are owed just and reasonable compensation for carriage of state and county indigent patients from their respective insurers, following *United States v. New York Cent. R. Co.*, 279 U.S. 73, 78 (1929). ("The Government admits, as it must, that reasonable compensation for such required services is a constitutional right".)

In addition, this Court has long established that a state may not require that private property devoted to a public use carry one class of persons gratuitously or for a price that is less than reasonable.

> It does not aid the argument to urge that the state may permit the carrier to make good its losses by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it

> could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action.

Northern Pac. Railway Co. v. State of North Dakota, 236 U.S. 585 (1915).

III.

THE DISTRICT COURT'S RULINGS ON PETITIONER'S TAKING FOR PRIVATE PURPOSE CLAIMS CONFLICTS WITH THIS COURT'S ESTABLISHED PRECEDENTS CONCERNING THE "PUBLIC USE" DOCTRINE.

There is no dispute that respondents have given petitioner's territory to a private party pursuant to respondent County's ordinance. This Court has established that the "public use" doctrine is coterminous with the scope of a sovereign's police powers. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

The basic question in this case is, therefore, whether the object is within the "sovereign's power". This requires interpretation of state law. The district court's holdings are erroneous because the district court relied only on its reading of the EMS Act isolated from the California Constitution and the broader statutory scheme. This Court and petitioner are put to a disadvantage by the failure of the Court of Appeals to review the state's law *de novo* as required by *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

Respondent County's legislation under the "police powers" rubric is limited to its political boundaries and may not conflict with general law.

> The authority to enact police ordinances for sanitation or health on the part of counties . . . is just as broad, sweeping and inclusive as the powers with relation thereto which are vested in the legislature itself, except that they must not conflict with the Constitution or general laws, and must be confined in their application only to the city or county adopting them.

Stanislaus County Dairymen's Protective Association v. County of Stanislaus, 8 Cal. 2d 378, 383-384 (1937). Notwithstanding any other illegality in the challenged ordinance, petitioner's property interest in its state license can neither be regulated nor taken pursuant to respondent County's ordinance declaring its own effectiveness in any city of Monterey County, because it does not have police power authority within cities. "Ordinances enacted by the board in the zoning and other regulatory fields are effective only in the unincorporated territory". *Stirling v. Board of Supervisors of Los Angeles*, 48 Cal. App. 3d 184, 187 (1975). "By either annexation or incorporation an area can insulate itself from the legislative enactments of the Board of Supervisors." *Id.* at 189. Respondents County and Board do not speak for the residents of Salinas nor regulate its businesses.

Moreover, respondent County's legislative requirement that the end result of the competitive process be a county contract for services in the cities is also void because it conflicts with the state constitutional delegation of powers

to the state Legislature. Respondent County does not have the authority to determine its own powers through its legislation, only the state legislature does. Calif. Const. Art. XI § 1. ("The Legislature shall provide for county powers."). Specifically, the legislature authorized cities, not counties, to contract for ambulance services within the city. Calif. Gov. Code § 38794. ("The legislative body of a city may contract for ambulance service to serve the residents of the city as convenience requires.") Indeed, the Legislature itself is limited to authorizing the provision of municipal services by counties only to those cities which request them. Calif. Const. Art. XI § 8a. ("The Legislature may provide that counties perform municipal functions at the request of cities within them.")

Finally, the California Supreme Court in *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 922 (1997) flat out held, "It appears incontrovertible the EMS Act preempts conflicting local ordinances and regulations." For the purposes of this Petition, we need compare only the jurisdiction claim made by respondents as to the area of the exclusive operating area of respondent health department local EMS Agency to conclude that respondent County's ordinance is invalid because it duplicates and contradicts state statute.

Monterey County Ord. No. 3815, § 14.40.020 B. Definitions,

> EMS Area means the County of Monterey, including all incorporated and unincorporated areas,

Calif. Health & Safety Code § 1797.74,

> "Emergency medical services area" or "EMS area" means the geographical area within the jurisdiction of the designated local EMS agency.

A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). "The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground." *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 682 (1960).

For any one or all of the reasons stated above, respondents County and Board were, and are, without power to make public policy anywhere in Monterey County regarding emergency ambulance services and specifically within petitioner's base of operations, the City of Salinas. Therefore, petitioner has stated a cause of action in respondents taking petitioner's property for an improper public use.

IV.

PETITIONER HAS STATED A CAUSE OF ACTION UNDER THE DUE PROCESS CLAUSE BECAUSE RESPONDENTS COUNTY AND ITS AGENTS HAVE A PECUNIARY CONFLICT OF INTEREST.

Notwithstanding that respondents County and Board have no authority to regulate emergency medical services by its legislation, their assumption of regulation is also prohibited by the Due Process clause because they have a

large financial institutional stake in offloading its emergency ambulance costs for indigent patients.

This Court has long required due process of law in the regulation of prices of public utilities. "The question of the reasonableness of a rate of charge . . . is eminently a question for judicial investigation, requiring due process of law for its determination." *Chicago, Milwaukee & St. Paul RR v. State of Minnesota*, 134 U.S. 418, 458 (1890). A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as courts. *Gibson v. Berryhill*, 411 U.S. 579 (1973). A public decision maker is disqualified where he/she has a large institutional stake in the outcome of the proceedings. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

During the pendency of the appeal below, the California Supreme Court in *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 932 (1997) cited with approval lower courts' holding that counties had primary financial responsibility for providing indigents with emergency medical services.

> When an emergency occurs, anywhere in the county, which requires hospitalization, it necessarily follows that the duty to provide medical care includes the duty to provide emergency transportation from the place where the indigent is to the hospital where he can receive care. The cost of providing that service is, by statute, a proper county charge.

City of Lomita v. County of Los Angeles, 148 Cal. App. 3d 671, 673 (1973). "In any case, however, the cost of such

services, no matter how or by whom provided, is a charge on the County to be met out of County funds." *Id.* at 674. The holding was clarified and affirmed in *City of Lomita v. Superior Court*, 186 Cal. App. 3d 479 (1986).

Therefore, the County respondents have a very large institutional financial stake in choosing ambulance providers and setting ambulance prices and are disqualified from making such decisions.

V.

THE QUESTIONS PRESENTED ARE IMPORTANT.

The questions presented are important not merely to petitioner, but to the public at large who require emergency medical transportation. Clearly it is in the public's interest as well as petitioner's to be assured that rates for emergency ambulance services are set in a manner which meets the constitutional standard of balancing the investors' interests against the public's by an adjudicator who does not have a financial interest contrary to *both* petitioner and the public. "The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public." *Covington & Lexington Turnpike v. Sandford*, 164 U.S. 578, 596 (1896).

Moreover, since the process of excluding one emergency ambulance provider for another, necessarily gives the public only one provider, it is clearly in the public's interest that the local government which does the selection actually has

the power to act in the citizen's interest and is exercising that power for the benefit of the citizens, rather than for the economic benefit of the governmental entity.

Finally, petitioner suggests that it is important for this Court to reaffirm the applicability of the Due Process and Takings clauses to utility property as set forth herein above for guidance to the lower federal courts in light of the lack of litigation in federal courts following the enactment of 28 U.S.C. § 1342. For example, in *Redwood Empire Life Support v. The County of Sonoma*, 190 F.3d 949 (9th Cir. 1999), the Ninth Circuit followed the reasoning of the California Court of Appeals in *Schaefer's Ambulance Service v. County of San Bernardino*, 68 Cal. App. 4th 581 (1998). In *Schaefer's* at 589, the state Court of Appeals said:

> The County asserts that most ambulance services use the income from interfacility transfers to subsidize more traditional emergency medical services. It stands to reason that providing interfacility transfers under contract to an HMO is a more stable and predictable source of income than responding to 911 calls from the general population; *the poor* and the uninsured presumably account for more than their proportionate share of the latter. If interfacility transfers were deemed non-emergency ambulance services, outside providers could invade an exclusive operating area and "cherry pick" this income. (Emphasis provided).

Notwithstanding any other constitutional infirmity, it is extraordinarily clear that San Bernardino County has unlawfully chosen ambulance providers who agree to give

the County ambulance service free or at less than compensatory rates for indigent patients in exchange for charging other classes of service at an exorbitant ("cherry-picking") rate. *Northern Pac. Railway Co. v. State of North Dakota*, 236 U.S. 585 (1915).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE DONG
Attorney for Petitioner
786 Holly Oak Drive
Palo Alto, California 94303
(650) 321-4423

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED OCTOBER 21, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-17067

D.C. No. CV-95-20585-RMW

A-1 AMBULANCE SERVICE, INC.,
a California corporation,

Plaintiff-Appellant,

v.

ROBERT J. MELTON, M.D.; CHRIS LE VENTON, M. P. H.; MONTEREY COUNTY EMERGENCY MEDICAL SERVICES; MICHAEL WILLIAMS; THE ABARIS GROUP, a California corporation; COUNTY OF MONTEREY, a political entity; MONTEREY COUNTY BOARD OF SUPERVISORS; SAM KARAS; TOM PERKINS; JUDY PENNYCOOK; SIMON SALINAS; EDITH JOHNSEN; KENT COXON; TODD VALERI; DANIEL SMILEY,

Defendants-Appellees.

Appendix A

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California,
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted August 5, 1999
Pasadena, California

Before: KOZINSKI and THOMAS, Circuit Judges, and RAWLINSON,[2] District Judge.

The district court correctly determined that the plaintiff was not deprived of a right, privilege or immunity secured by the United States Constitution or the laws of the United States. Therefore, plaintiff's federal claims are not legally viable.

AFFIRMED.

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

2. The Honorable Johnnie B. Rawlinson, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING DEFENDANTS' MOTION TO DISMISS DATED AND FILED MAY 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-95-20585 RMW(EAI)

A-1 AMBULANCE SERVICE, INC.,
a California Corporation

Plaintiff,

v.

ROBERT J. MELTON, M.D., M.P.H., CHRIS LE VENTON, THE MONTEREY COUNTY EMERGENCY MEDICAL SERVICES AGENCY, MICHAEL WILLIAMS, THE ABARIS GROUP, a California Corporation, THE COUNTY OF MONTEREY, a political entity, THE MONTEREY COUNTY BOARD OF SUPERVISORS, SAM KARAS, TOM PERKINS, JUDY PENNYCOOK, SIMON SALINAS, EDITH JOHNSEN, KENT COXON, TODD VALERI, and DANIEL SMILEY,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS

Appendix B

The motions to dismiss of defendants Monterey County Emergency Medical Services Agency ("Monterey EMS Agency"), County of Monterey ("Monterey" or "County"), and Monterey County Board of Supervisors ("Supervisors") (collectively the "County Defendants"); Robert J. Melton, M.D., M.P.H. ("Melton"), Chris Le Venton ("LeVenton"), The Abaris Group ("Abaris"), Michael Williams ("Williams"), Sam Karas ("Karas"), Tom Perkins ("Perkins"), Judy Pennycook ("Pennycook"), Simon Salinas ("Salinas"), Edith Johnsen ("Johnsen"), Kent Coxon ("Coxon") and Todd Valeri ("Valeri") (collectively "'Individual Defendants"); and Daniel Smiley ("Smiley") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure were heard and submitted on February 2, 1996. The court has read the moving and responding papers and heard the arguments of counsel. For the reasons set forth below the court grants defendants' motions.

I. BACKGROUND

Plaintiff A-1 Ambulance Service, Inc. ("Plaintiff" or "A-1") is a California corporation licensed by the State of California to operate emergency ambulances. Plaintiff's complaint in essence is that Monterey County Code Chapter 15.40, *et seq.* is unconstitutional, a competitive bid process for ambulance services conducted pursuant to the allegedly unconstitutional ordinance was improperly conducted and that during the allegedly improper competitive bid process plaintiff's proposal containing "intellectual and confidential business property" was unlawfully disclosed.

Appendix B

Plaintiff filed a civil rights action under 42 U.S.C. section 1983 against multiple defendants alleging that defendants have taken plaintiff's property for private use and without due process of law in violation of the Fifth and Fourteenth Amendments and have deprived plaintiff of the use of its state ambulance license in retaliation for its resort to litigation in a prior dispute. Plaintiff seeks compensatory and punitive damages, a preliminary and permanent injunction restraining defendants from implementing Monterey's exclusive contract for ambulance services, a declaration that Monterey County Code Chapter 15.40 *et seq.* is unconstitutional, a preliminary and permanent injunction restraining the Monterey EMS Agency from expending any public funds to administer the allegedly unconstitutional Monterey ordinance, attorneys fees, costs, expenses and such other relief the court deems just.

Defendants Monterey and its Supervisors, Karas, Pennycook, Salinas, Johnsen and Perkins (collectively "Supervisors") are being sued for allegedly exceeding their authority by enacting the challenged ordinance and conducting the allegedly wrongful competitive bidding process for ambulance services.

Pursuant to state statute, Monterey designated the Monterey Health Department to be the Monterey EMS Agency, which is the local EMS Agency responsible for the administration of local EMS services. Defendant Melton is the medical director of the Monterey EMS Agency and the Monterey Health Department and defendant Le Venton is the administrator of the Monterey EMS Agency.

Appendix B

Defendant Abaris is a California corporation which plans and develops EMS systems and defendant Williams is Abaris' president. Monterey contracted with Abaris to plan and execute the acquisition of an emergency ambulance contract for Monterey. Abaris and Williams are being sued in connection with their conduct in performing such contract.

Defendants Coxon and Valeri were members of the County committee which reviewed proposals submitted for provision of ambulance services including A-1's proposal. Coxon and Valeri are being sued in their "personal" capacities.

Defendant Smiley is the Chief Deputy Director of the State EMS Authority and is being sued "in his personal capacity in connection with his conduct in approving the Monterey County EMS plan."

II. LEGAL STANDARDS

The court may dismiss a complaint as a matter of law for either of two reasons: (1) lack of a cognizable legal theory, or (2) the pleading of insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533 (9th Cir. 1984) (citations omitted). In ruling on a motion to dismiss, district courts must accept all material allegations of fact alleged in the complaint as true and resolve all doubts in favor of the plaintiff. *Blake v. Dierdorff*, 856 F.2d 1365, 1368 (9th Cir. 1988). The court, however, need not accept legal conclusions asserted in the complaint even if pled as "facts." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The court is to grant the motion to dismiss if it

appears that plaintiffs can prove no set of facts which would entitle plaintiffs to relief. *Sun Savings & Loan Assoc. v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987).

III. ANALYSIS

Five of plaintiff's claims for relief are brought under 42 U.S.C. section 1983. To state a claim under section 1983, the plaintiff must show that the defendants (1) acted under color of state law or authority and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution and the laws of the United States. *Sykes v. State of California*, 497 F.2d 197, 200 (9th Cir. 1974). None of the defendants disputes acting under color of state law. The court, therefore, needs only consider whether plaintiff has sufficiently pled that the defendants have deprived it of a right, privilege, or immunity secured by the Constitution and laws of the United States.

Plaintiff, however, has failed to allege the deprivation of a constitutional right. Plaintiff's five section 1983 causes of action claim a deprivation of either one or both of plaintiff's claimed protected property interests, its alleged trade secret information contained in its proposal to Monterey for ambulance services and its state granted ambulance license.

Although plaintiff alleges a constitutional deprivation resulting from the wrongful disclosure of its trade secret, plaintiff voluntarily disclosed the information to the County in its proposal as part of the competitive bid process to secure the sought after ambulance contract. Under the California

Public Records Act ("Records Act"), the bids upon which the County relied to award its ambulance contract are public records subject to disclosure absent some exception. The Records Act recognizes that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code § 6250. Accordingly, the Records Act provides that public records of state and local agencies are generally open to public inspection. Cal. Gov. Code § 6253. A public agency can only withhold disclosure of public records by either (1) relying on the enumerated exceptions contained in Government Code section 6254 or (2) showing that the public interest in not disclosing the information clearly outweighs the public interest in disclosure. Cal. Gov. Code § 6255.

Plaintiff argues that its proposal should have been kept confidential under the exception enumerated at Government Code section 6254(k), which provides an exception to disclosure for "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Plaintiff asserts that its proposal falls within Evidence Code section 1060 which contains the privilege to protect trade secret.

The California Public Records Act was modeled after the federal Freedom of Information Act ("FOIA"), and therefore it "can draw on its federal counterpart for judicial construction and legislative history." *San Gabriel Tribune v. Superior Ct.*, 143 Cal. App. 3d 762, 772 (1983) (citing *American Civil Liberties Union Foundation v. Deukmejian*,

32 Cal. 3d 440, 447 (1982) modified 32 Cal. 3d 866a. "'[T]he [Records] Act, like the FOIA, reflects a general policy of disclosure that can only be accomplished by narrow construction of the statutory exemptions." *San Gabriel Tribune v. Superior Ct.*, 143 Cal. App. 3d at 772-773 (citing *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 653, fn.7 (1974)). After analyzing the purpose of the Records Act and its exceptions, the California Court of Appeal in *San Gabriel Tribune v. Superior Ct.* found that the public's need to be informed outweighed any legitimate privacy interest of plaintiff in a case wherein the plaintiff sought protection of financial information provided to a municipality in support of a rate increase pursuant to Government Code section 6254(k) and Evidence Code section 1060's privilege for trade secret. That court further stated that "assurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public." *San Gabriel Tribune v. Superior Ct.*, 143 Cal. App. 3d at 776. Such assurances do not convert a public record into a private one. *Id.* at 775 (citing *Johnson v. Winter*, 127 Cal. App. 3d 435, 439 (1982)). This court is persuaded by the analysis in *San Gabriel Tribune v. Superior Ct.* and finds that in this case plaintiff's voluntarily submitted proposal for ambulance services was not protected from disclosure under the Records Act. Therefore, plaintiff has no protected property interest in the information contained in its proposal.

Plaintiff also alleges a constitutional taking resulting from the alleged deprivation of the use of its state ambulance license. The alleged deprivation presumably results from plaintiff's failure to be the successful bidder in the process to obtain a Monterey ambulance contract. Plaintiff

characterizes the competitive process for the ambulance contract as unlawful and biased.

The competitive process was not unlawful. "A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan." Cal. Health & Safety Code § 1797.224. Monterey conducted such a competitive process but plaintiff complains that the process was unlawful due to the involvement of Monterey and its Supervisors. The court sees nothing in the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("EMS Act"), codified at section 1797 *et seq.*, which prohibits such involvement. California enacted the EMS Act to ensure the provision of effective and efficient emergency medical care throughout the state. Cal. Health & Safety Code § 1797.6. The EMS Act created the Emergency Medical Services Authority ("State EMS Authority"). Cal. Health & Safety Code § 1797.100. The State EMS Authority has various responsibilities including assessing the needs of each EMS area, developing planning and implementation guidelines for EMS systems, providing technical assistance to existing agencies, counties and cities for purposes of developing the components of the EMS system, and receiving implementation plans from local EMS agencies. Cal. Health & Safety Code §§ 1797.102-1797.105. The State EMS Authority is also authorized to adopt rules and regulations as necessary to carry out the purposes and intent of the EMS Act. Cal. Health & Safety Code § 1797.107.

Appendix B

Under the EMS Act, each county may develop an emergency medical services program. Cal. Health & Safety § 1797.200. Each such county "shall designate a local EMS agency which shall be the county health department, an agency established and operated by the county, an entity with which the county contracts for the purposes of local emergency medical services administration, or a joint powers agency created for the administration of emergency medical services by agreement between counties or cities and counties." Cal. Health & Safety Code § 1797.200. Each local EMS agency shall be headed by a qualified medical director. Cal. Health & Safety Code § 1797.202. The local EMS agency shall plan, implement, and evaluate an EMS system in accordance with the provisions of the EMS Act and is responsible for the implementation of advanced and limited advanced life support systems and the monitoring of related training programs. Cal. Health & Safety Code §§ 1797.204-1797.206.

Notwithstanding plaintiff's arguments to the contrary, the EMS Act anticipates that local EMS agencies may adopt regulations, standards, and guidelines pursuant to the EMS Act. *See* Cal. Health & Safety Code § 1797.106. Moreover, the State of California acknowledged such authority in its amicus curiae brief submitted in the matter of *911 Emergency Services, Inc. v. Sacramento Regional Fire/MES Communications Center, et al.*, CV-94-00806 (E.D.Cal. 1995), in which it stated:

> The EMS Authority's functions include assessment of each EMS agency or system service area for purposes of determining the need for

> additional EMS in the local areas, coordination of EMS between the local agencies, and assessment of the effectiveness of the services. [footnote omitted] Section 1797.102. However, statutory scheme contemplates a system which is administered and *regulated* at the county level. (emphasis in original).

Decl. Dong, Mot. Default J., Ex. 8 at 3.

Plaintiff argues that under the EMS Act only the Monterey EMS Agency and not the County and its Supervisors through whom it operates, can create the exclusive operating, areas pursuant to a competitive bid process. However, since the Monterey EMS Agency is the County's Health Department, a county division not a separate entity, the court sees no constitutional violation arising from the County's participation through its Supervisors in the adoption of an exclusive operating area pursuant to a competitive bid process. There is nothing in the EMS Act which requires the local EMS Agency to be an entity separate from the County.

Plaintiff also contends that the scope of the request for proposal for emergency ambulance services was in excess of the authority granted to the local EMS Agency under the EMS Act. However, even if such allegation is true, which has not been established, the violation of state law does not infringe upon the federal Constitution. *Snowden v. Hughes*, 321 U.S. 1, 11 (1943).

Appendix B

Although the institution of an exclusive operating area for ambulance services necessarily restricts excluded ambulance companies from utilizing their state license within the exclusive area, such regulation does not rise to the level of a constitutional taking of property. Not all regulation affecting the use of property constitutes a taking for which compensation is required under the Fifth and Fourteenth Amendments. *Agins v. City of Tiburon*, 447 U.S. 255, 260-261 (1980). "Although no precise rule determines when property has been taken, [citations omitted], the question necessarily requires a weighing of private and public interests." *Id.* A taking occurs "if the particular ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 . . . (1928), or denies an owner economically viable use of his [property], see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 . . . (1978)." *Id.* at 260. In this case, the creation of an exclusive operating area is authorized by the EMS Act and substantially advances the legitimate state interest in the provision of emergency medical services. Moreover, the exclusive operating area is only a restriction of the provision of limited advanced life support or advanced life support services. It is not a restriction on other services. Therefore, the creation of the exclusive operating area pursuant to the competitive bid process cannot be said to deny plaintiff economically viable use of its state ambulance license. Consequently, no constitutional taking of property in violation of the Fifth and Fourteenth Amendments has occurred.

Plaintiff also argues that the competitive bid process was biased resulting in a due process violation. "A claim for

violation of procedural due process has two components. First, the plaintiff must show that a protected property interest was taken. Second, it must show that the procedural safeguards surrounding the deprivation were inadequate." *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 956 (9th Cir. 1991). Since plaintiff has failed to show that a protected property interest has been taken, as discussed above, its procedural due process claim fails.

Plaintiff further contends that defendants allegedly unlawfully enacted Monterey County Code section 15.40 et seq. and conducted or participated in a request for proposal for emergency ambulance services pursuant to that statute in retaliation against plaintiff for resorting to litigation of a dispute arising under a prior Monterey County ordinance.[1]

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1. Monterey's prior ordinance established exclusive operating areas for the provision of both emergency and non-emergency ambulance services. Plaintiff sued alleging that the EMS Act did not allow for the establishment of exclusive operating areas for non-emergency ambulance services. Although the ordinance was enacted in the same manner as the present one, plaintiff acknowledged at oral argument that it did not allege in the prior action that the County and its Supervisors did not have the authority to enact such an ordinance, it merely challenged the ordinance's coverage of non-emergency services. The prior litigation resulted in the issuance of an injunction on September 1, 1994 which permanently enjoined Monterey from contractually granting an exclusive operating zone for non-emergency medical transportation within the jurisdiction of the local EMS Agency. However, on May 7, 1996, the Ninth Circuit reversed the permanent injunction holding that "the California Legislature intended to permit EMS agencies to create exclusive operating areas for providers of advanced life

(Cont'd)

However, as previously discussed, the court sees no constitutional violation by defendants in enacting the challenged ordinance or in conducting a competitive bid process thereunder and therefore, the court finds plaintiff's contention without merit.

Furthermore, it is well-settled that the Supervisors have complete immunity from suit based on their enactment of the challenged ordinance since it constitutes a legislative act. See, e.g., *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (1982); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 577 (9th Cir. 1984). Similarly, "[i]ndividuals who are not legislators but whose acts are sufficiently legislative in nature are also absolutely immune from liability for those acts." *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031, 1046 (9th Cir. 1998). Therefore, Melton, Le Venton, Abaris and Williams would also have absolute immunity for their conduct to the extent it was legislative in nature.

In addition to any absolute immunity for their legislative acts, the Supervisors and Individual Defendants also have qualified immunity for their executive acts. The "[a]dministration of a municipal contract — a contract between a private party and a municipality — would generally seem to be an executive function . . . [since] [a]dministration of a contract does not involve the formulation of policy 'as a defined and binding rule of

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(Cont'd)

support, even when the transportation occurs during a non-emergency interfacility transfer." *A-1 Ambulance Service, Inc. v. County of Monterey, et al.*, 96 C.D.O.S. 3195, 3196 (9th Cir. May 7, 1996).

conduct.' Rather, it is more the type of ad hoc decisionmaking engaged in by an executive." *Cinevision Corp. v. City of Burbank*, 745 F.2d at 580. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 578 (9th Cir. 1984) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).[2]

To be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity is not limited to cases where the "very action in question has previously been held unlawful." *Id.* Rather the inquiry is whether in light of pre-existing law the unlawfulness of the action is apparent. *Id.* The court finds the unlawfulness, if any, of the actions of the Supervisors and Individual Defendants in conducting or participating in the competitive bid process pursuant to the challenged ordinance in this case was not apparent.

Again, plaintiff does not challenge the right of the Monterey EMS Agency to conduct a competitive bid process to establish exclusive operating areas, it challenges Monterey's and its Supervisors' authority to do so. However, as previously noted, the Monterey EMS Agency is the County's Health Department, a county division not a separate

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2. Although *Harlow* specifically related to state officials, there seems little reason to doubt it also applies to local legislators. *Cinevision Corp. v. City of Burbank*, 745 F.2d at 579.

entity, therefore, the court sees no constitutional violation arising from the County conducting through its Supervisors a competitive bid process to establish exclusive operating areas. Therefore, the court finds that the Supervisors would not reasonably know that their actions here violated clearly established constitutional rights of the plaintiff. Similarly, defendants Abaris, Williams, Coxon and Valeri, who participated in the process under contract with Monterey, also have qualified immunity for their actions since they would not reasonably have known that their actions performed at the request of Monterey and its Supervisors violated clearly established constitutional rights of the plaintiff. *See Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993) (qualified immunity may be raised by a private entity that exercises its discretion in carrying out governmentally imposed duties).

Likewise, defendant Smiley has qualified immunity for his actions in this case. Smiley is being sued in his personal capacity because he allegedly "knew his approval of the Monterey County RFP [request for proposal for emergency ambulance services] and the County's ordinance regulating EMS services was contrary to law." However, as noted above, the EMS Act specifically anticipates that local EMS agencies may adopt regulations, standards, and guidelines pursuant to the EMS Act. See Cal. Health & Safety Code § 1797.106. Therefore, it can hardly be said Smiley knew or reasonably should have known that his approval of the Monterey ordinance, pursuant to his authority and duties under the EMS Act, violated clearly established statutory or constitutional rights of plaintiff.

Since plaintiff has failed to allege the deprivation of a constitutional right, all five of its section 1983 claims for relief are dismissed. Moreover, since the Supervisors, Individual Defendants and Smiley all have either absolute or qualified immunity for their actions, the claims against them are dismissed with prejudice. Furthermore, considering that all of plaintiff's federal claims have been dismissed, this court declines to exercise supplemental jurisdiction over plaintiff's sixth claim for relief, a supplemental state claim for the prevention of *ultra vires* and illegal expenditure of public funds brought under California Code of Civil Procedure section 526(a).

IV. ORDER

For the foregoing reasons, the court grants all defendants' motions to dismiss. Plaintiff has 20 days leave to amend its complaint against the County of Monterey (and the Monterey EMS Agency), if it can do so in good faith. The court, as it currently understands plaintiff's case, doubts that plaintiff can amend in good faith based upon the reasoning in this opinion.

DATED: 5/22/96

s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX C — JUDGMENT OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED SEPTEMBER 29, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-95-20585 RMW

A-1 AMBULANCE SERVICE, INC.,

Plaintiff,

v.

ROBERT J. MELTON, M.D., et al.,

Defendant.

JUDGMENT OF DISMISSAL

On May 22, 1996 the court entered its order dismissing the complaint in this matter with 20 days leave to amend. Plaintiff has filed no amended complaint or taken any other action with respect to this case. Therefore, IT IS HEREBY ORDERED that the action is dismissed and plaintiff is to take nothing by way of its complaint. Judgment of dismissal is hereby entered.

IT IS SO ORDERED.

DATED: September 29, 1998

s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT DATED AND FILED MAY 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-95-20585 RMW(EAI)

A-1 AMBULANCE SERVICE, INC.,
a California Corporation

Plaintiff,

v.

ROBERT J. MELTON, M.D., M.P.H., CHRIS LE VENTON, THE MONTEREY COUNTY EMERGENCY MEDICAL SERVICES AGENCY, MICHAEL WILLIAMS, THE ABARIS GROUP, a California Corporation, THE COUNTY OF MONTEREY, a political entity, THE MONTEREY COUNTY BOARD OF SUPERVISORS, SAM KARAS, TOM PERKINS, JUDY PENNYCOOK, SIMON SALINAS, EDITH JOHNSEN, KENT COXON, TODD VALERI, and DANIEL SMILEY,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION
FOR DEFAULT JUDGMENT

Appendix D

Plaintiff's motion for default judgment on its third, fourth, and fifth claims for relief against the County of Monterey ("Monterey") and the Monterey County Board of Supervisors ("Supervisors") on grounds of attorney misconduct was heard and submitted on February 2, 1996. The court has read the moving and responding papers and heard the arguments of counsel. For the reasons set forth below the court denies plaintiff's motion.

Plaintiff A-1 Ambulance Service, Inc. ("Plaintiff" or "A-1") is a California corporation licensed by the State of California to operate emergency ambulances. Plaintiff filed a civil rights action under 42 U.S.C. section 1993 against multiple defendants, including Monterey and its Supervisors and the Monterey County Emergency Medical Services Agency ("Monterey EMS Agency"), who plaintiff alleges have taken plaintiff's property without due process of law in violation of the Fifth and Fourteenth Amendments.

California enacted the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act ("EMS Act"), under which it created the Emergency Medical Services Authority ("State EMS Authority") to administer the emergency medical services system throughout the state. Under the EMS Act, counties may develop an emergency medical services program for which it must designate a local EMS agency to administer the EMS Act at the local level. Such designated agency may be the county's health department, an agency established and operated by the county, an entity with which the county contracts or a joint powers agency. Cal. Health & Safety Code § 1797.2000. Monterey participates in the EMS system

and, in accordance with state statute, has designated its own health department to act as Monterey's local EMS Agency.

Plaintiff contends that the County Counsel, which is the attorney of record for defendants Monterey, its Supervisors and the Monterey EMS Agency against plaintiff's suit, is not authorized to represent the Monterey EMS Agency and that such representation is inappropriate since Monterey and its Supervisors have adverse interests to the Monterey EMS Agency. Plaintiff further contends that the County Counsel's representation to this court that the Monterey EMS Agency was not a separate entity from the county defendants was false and, as a sanction for such alleged fraud on the court, plaintiff seeks a default judgment against Monterey and its Supervisors.

Defendants argue that county counsel may represent the designated Monterey EMS Agency since it is not a separate entity from the County. Moreover, defendants argue that the interests of the County, its Supervisors and the County's Health Department, which is the designated local EMS agency, are not adverse in this matter. The court agrees with defendants and finds no conduct for which a default sanction is appropriate.

Consequently, the court denies plaintiff's motion for default judgment.

DATED: 5/22/96

s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX E — RELEVANT STATUTES AND ORDINANCES

Calif. Health & Safety Code § 1797.1

1797.1. The Legislature finds and declares that it is the intent of this act to provide the state with a statewide system for emergency medical services by establishing within the Health and Welfare Agency the Emergency Medical Services Authority, which is responsible for the coordination and integration of all state activities concerning emergency medical services.

* * *

Calif. Health & Safety Code § 1797.74

1797.74. "Emergency medical services area" or "EMS area" means the geographical area within the jurisdiction of the designated local EMS agency.

* * *

Calif. Health & Safety Code § 1797.105

1797.105. (a) The authority shall receive plans for the implementation of emergency medical services and trauma care systems from EMS agencies. * * *

* * *

Appendix E

Calif. Health & Safety Code § 1797.107

1797.107. The authority shall adopt, amend, or repeal, * * * such rules and regulations as may be reasonable and proper to carry out the purposes and intent of this division and to enable the authority to exercise the powers and perform the duties conferred upon it by this division not inconsistent with any of the provisions of any statute of this state.

* * *

Calif. Health & Safety Code § 1797.200

1797.200. Each county may develop an emergency medical services program. Each county developing such a program shall designate a local EMS agency which shall be the county health department, * * *, or a joint powers agency created for the administration of emergency medical services by agreement between counties or cities and counties pursuant to the provisions of Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code.

* * *

Calif. Health & Safety Code § 1797.204

1797.204. The local EMS agency shall plan, implement, and evaluate an emergency medical services system, in accordance with the provisions of this part, consisting of an organized pattern of readiness and response services based on public and private agreements and operational procedures.

* * *

Appendix E

Calif. Health & Safety Code § 1797.208

1797.208. The local EMS agency shall be responsible for determining that the operation of training programs at the EMT-I, EMT-II, and EMT-P levels are in compliance with this division, and shall approve the training programs if they are found to be in compliance with this division. The training program at the California Highway Patrol Academy shall be exempt from the provisions of this section.

* * *

Calif. Health & Safety Code § 1797.220

1797.220. The local EMS agency, using state minimum standards, shall establish policies and procedures approved by the medical director of the local EMS agency to assure medical control of the EMS system. The policies and procedures approved by the medical director may require basic life support emergency medical transportation services to meet any medical control requirements including dispatch, patient destination policies, patient care guidelines, and quality assurance requirements.

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Calif. Health & Safety Code § 1797.224

1797.224. A local EMS agency may create one or more exclusive operating areas in the development of a local plan, if a competitive process is utilized to select the provider or providers of the services pursuant to the plan. * * * A local

EMS agency which elects to create one or more exclusive operating areas in the development of a local plan shall develop and submit for approval to the authority, as part of the local EMS plan, its competitive process for selecting providers and determining the scope of their operations. * * *

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Monterey County Ord. No. 3815, § 14.40.020

§ 14.40.020 B. Definitions, EMS Area means the County of Monterey, including all incorporated and unincorporated areas.

§ 14.40.020 B. Definitions, EMS Agency means the Monterey Emergency Medical Services Agency, established by the County of Monterey, which administers the county EMS system. The EMS Agency acts through the Monterey County Board of Supervisors, the EMS Director, the EMS Medical Director, the EMS Administrator, or through any other authorized person acting on behalf of the EMS Agency.

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Monterey County Ord. No. 3815, § 15.40.040

§ 15.40.040 AMBULANCE REQUIREMENTS. A. *Required.* It shall be unlawful for any person either as owner, agent or otherwise, to offer to provide to the public, to engage in the business of providing to the public, or to provide medical transport to any person with the express or implied representation that one is engaged in the business

of providing to the public, any of the following services in Monterey County, without either a license or variance issued by the County or a contract with the County authorizing, such services to be provided: 1. Advanced life support programs; 2. Base hospital; 3. Ambulance service; or 4. Air ambulances;

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Monterey County Ord. No. 3815, § 15.40.046

§ 15.40.046 B. ***Ambulance Rates.*** The EMS Agency may establish a schedule of maximum ambulance rates that may be charged by any ambulance provider providing medical transportation services that originate in Monterey County. The maximum rates may be set by resolution of the Board, by contract between the EMS Agency and the various ambulance providers, by notice issued by the EMS Director, or by temporary variances issued by the EMS Director, as hereinafter provided. Rates set by resolution of the Board shall apply throughout the County, except as otherwise provided by the Board in its resolution establishing those rates, and except further that rates set by contract with ambulance providers shall supersede rates set by resolution of the Board unless such contract incorporates by reference the rates set by resolution of the Board. * * *.

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